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Case No. 90-820

In The

Supreme Court of the United States

October Term 1990

—o—

Jack R. Whitehorn and
Mary Ruth Whitehorn

Petitioners

vs.

Margaret H. Murphy,
Law Firm: Smith, Gambrell & Russell and
Robert M. Garstin

Respondents

—o—

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

—o—

REPLY BRIEF

—o—

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REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

COME NOW Jack R. Whitehorn and Mary Ruth Whitehorn, petitioners herein, and respectfully file this their reply brief to respondents Margaret H. Murphy and Law Firm; Smith, Gambrell & Russell's Brief in Opposition to Petition for Writ of Certiorari.

First, petitioners emphasize to the Court that respondents Margaret H. Murphy and Smith, Gambrell & Russell's lower court case No. 89-15630 and respondent Robert M. Garstin's lower court case No. 89-15767 were appealed by separate notice. Separate docket fees were paid by petitioners.

Respondents Murphy and Law Firm: Smith, Gambrell & Russell case No. 89-15630 was filed and docketed by the lower court March 17, 1989. Respondent Robert M. Garstin's lower court case No. 89-15767 was filed and docketed on June 13, 1989.

The significance of this crucial fact is respondents' case No. 89-15630 contested process of service, while respondent case No. 89-15767 was hand served and has not contested the process of service.

The lower court intermixed the said cases and set out (Petition for Writ of Certiorari, Appendix 1): "We also agree with the district court that the Whitehorns improperly served the appellees." Thus the lower court ran afoul of the district court order since respondent Garstin did not contest the process of service and the district court made no such finding.

The time for filing a "brief in opposition" has expired pursuant to Court rules and respondent Garstin has forfeited any opposition to the "Petition for Writ of Certiorari" now before the court.

The respondents Murphy and Law Firm: Smith, Gambrell & Russell's "Brief in Opposition" served on petitioners herein was not signed by any party on behalf of said respondents. However, petitioners will reply in case the Court has accepted and considers the said "Brief in Opposition."

The Court's Rule 15 sets out the "Brief in Opposition should address any preconceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the court if certiorari were granted."

Petitioners' analysis of the said "Brief in Opposition' reflects respondents have acquiesced to the "Petition for Writ of Certiorari" as they fail to address or refute the specific legal rationale underlying the said petition.

It appears the thread respondents continue to grasp is the erroneous contention of the doctrine of *res judicata*. The said doctrine applied to the complaint at bar through confirmation of a plan of reorganization of WFDR, Inc. (bankruptcy case of a different entity).

Further, more predominant than prior pleadings respondents advance improper service of the instant complaint.

The respondents misinterpret the instant complaint and the significance that the "Federal Communication Commission (FCC) broadcast licenses" were not, are not, and never can be a part of the WFDR, Inc. estate. This fact is well grounded by United States Statute, precedent case law and the United States Constitution. Said authorities are well maintained in the "Petition for Writ of Certiorari" and will not be repeated here.

Respondents' illusions that 11 U.S.C. § 1141, the "effect of confirmation," is involved is not supportable as a matter of law. The court must have jurisdiction to implement said statute, as fully discussed in the petition. The corporate court, on its own, denied jurisdiction over

FCC law. The said statute cannot possibly be involved. The inappropriateness and futility of said statute as proclaimed is contrary to the instant complaint as a matter of law. Title 11 U.S.C. § 541(a)(1) provides that regardless of location, property of the estate is comprised of "all legal and equitable interests of the debtor as of the commencement of the case." The "FCC' broadcast licenses" are not property of the corporate estate as positive law sets out in the petition, but to the contrary, by "settlement" the "FCC broadcast licenses" became the property of petitioner Jack Whitehorn in bankruptcy case No. BK-S-80-00936-RCJ, United States Bankruptcy Court for the District of Nevada as fully set out in the petition and is indisputable.

Moreover, the following settled law will further invalidate 11 U.S.C. § 1141 being applied to the instant complaint. A second action was barred by claim preclusion except as to matters that occurred after the filing of the first action; *Spiegel v. Continental Ill. Nat. Bank*, C.A. 7th 1986, 790 F.2d 638, 644-646 certiorari denied 107 S. Ct. 579, 479 U.S. 987, 93 L.Ed 2d 582.

The amended plan of WFDR was filed on May 27, 1981. Said plan confirmed by the bankruptcy court June 29, 1981. (Record below) The "Fraud" complained of was perpetrated by respondents filing fraudulent written document before the "FCC" on or about July 14, 1981.

The purposes of issue preclusion do not support preclusion as to a matter that was simply assumed, but neither decided in a prior proceeding. *See Washington Water Power Co. v. FERC*, C.A.D.C. 1985, 775 F.2d 305, 341.

Right off the bat the Atlanta Houdini's are at it again, with yet another false and misleading maneuver. In "Brief in Opposition," Statement of the Case,

respondents state the complaint at bar has been litigated by other tribunals and are trying to equate said proceedings with the instant complaint -- an incorrect determination, *animo* by respondents.

Respondents' portrayal of petitioners' "neglect or ignorance of legal rights and responsibilities" is not as represented. Petitioners set out in the petition the reasons we must proceed pro se and we are not as articulate as learned counsel for respondents. However, stupidity allows comprehension that the first lesson one must learn on the subject of *res judicata* is that judicial findings must not be confused with absolute truth. For purposes of *res judicata* a cause of action is comprised of the facts which establish the right * * * . * * * [O]ne has to determine whether a wrong for which redress is sought is the same for both actions; *See Midcontinent Broadcasting Co. v. Dresser Indus.*, C.A. 8th, 1982, 669 F.2d 564.

Respondents set out *animo* by "phrase" or "words" throughout their "Brief in Opposition" statements designed to achieve the appearance of a fact or change the legal context of a judicial proceeding or judgment, *i.e.*:

Page 4, ¶ 2: "Complaint seeks damages . . . arising out of the handling of the bankruptcy of WFDR, Inc."

The respondents, not by any jurisdictional court order through the WFDR, Inc. bankruptcy case but by greed, the motivation behind the legal action, committed "Fraud." (See Complaint/Petition Appendix 4.)

Page 5, ¶ 4: "After unsuccessfully challenging various aspects of the WFDR chapter 11 proceedings, petitioners filed a voluntary individual petition under Chapter 11 in Nevada on October 6, 1980."

The petitioners herein filed their personal chapter 11 case in good faith, pursuant to a legitimate and genuine desire to obtain the judicial relief available through chapter 11 of the United States Bankruptcy Code.

Page 6, ¶ 1:

Respondents did not mention, while setting forth the WFDR order entered March 16, 1981, Petitioners' raising the "FCC Law" matter and the bankruptcy court's unconditional and absolute renouncing of jurisdiction over "FCC Law." It is "clear that the parties need only have had the opportunity to raise the question of jurisdiction; *see Republic Supply Co. v. Shoaf*, C.A. 5th, 1987, 815 F.2d 1046, 1051-1053. **The petitioners did in fact comply.**

Page 7, ¶ 2: "Ownership interest in WFDR, evidenced by the newly issued certificates of interest tendered in exchange for the cancelled shares, was to be redeemed by the payment of $35,000 from the proceeds generated subsequent to the sale to Provident." (Emphasis added.)

The word redeem or redeemed does not appear, said word changes the legal context of the document and *animo* is a false declaration to this Court.

Page 7, ¶ 3: "On January 26, 1984, the bankruptcy court approved the settlement in recognition and satisfaction of petitioners' interest in WFDR." (Emphasis added.)

The word **satisfaction** does not appear in the said bankruptcy order, a patent change of legal context of said order and a false declaration to this Court.

Page 7, ¶ 4: "Petitioners essentially asked the court to avoid the earlier transfer of the WFDR stock to Provident. (Emphasis added.)

Petitioners herein were under the impression that the stock was cancelled, **not transferred**. Petitioners were not privy to be involved in the stock transaction even though the original certificates were issued and titled to petitioner Jack Whitehorn. (See Murphy Deposition below.) If said stock was actually transferred, there is certainly no question as to the automatic stay; 11 § 362 being violated in petitioners' personal bankruptcy case. "The Complaint to Compel Turnover of Property" is not as characterized by respondents.

Page 8, ¶ 3: "Specifically, petitioners alleged that they were damaged as a result of the deprivation of stock and assets, including FCC licenses sold as a result of the WFDR bankruptcy." (Emphasis added.)

The instant complaint does not bare any nexus to the false and misleading statement by respondents. As set out *supra*, the instant complaint is absolutely silent as to any claim arising out of the handling of the WFDR bankruptcy case. There is absolutely no claim of deprivation of the WFDR stock, and certainly no claim for any WFDR assets. The respondents characterize the "FCC Licenses" as an asset sold as a result of the WFDR bankruptcy. Petitioners do not believe respondents are this misinformed nor are they so blind as not to comprehend the instant complaint, The respondents are *animo* trying to deceive this Court by their sophisticated schemes and abuses.

To apply the amended plan of WFDR, Inc, *i.e.*, Statute 11 U.S.C. § 1141, to the complaint at bar, the court must have jurisdiction to make orders or judgments. Every court has jurisdiction to determine its own

jurisdiction. When a bankruptcy court has ruled on its jurisdiction, it can then be taken to the District Court on appeal. *See Ravin v. New Jersey Bank, N.A.*, 32 B.R. 716 (D.N.J. 1983). Here there was no appeal to the Georgia Bankruptcy Court rejecting jurisdiction to FCC law. "The determination by a court of general jurisdiction of its own jurisdiction is conclusive as to the parties and their privies"; *In re Constructors of Florida, Inc.*, C.A.. 5th, 1965, 349 F.2d 595, 600, certiorari denied 86 S. Ct. 886, 383 U.S. 912, 15 L.Ed. 2d 667.

FCC law, nor the complaint at bar, was never before the Georgia Bankruptcy Court after said court's rejection of jurisdiction. Order Filed March 16, 1981. (Petition Appendix 6)

The *Southmark Properties v. Charles House Corporation*, 742 F.2d 862 (5th Cir. 1984) case, cited by respondents, is not by any means apposite to the instant complaint. The said case may be distinguished as follows: Respondent Garstin was acting president, not petitioner. The majority shareholder was not "settled" until January 26, 1984, not as said case reports. Petitioner herein filed pleadings with the corporate bankruptcy court. These pleadings set out that the proposed sale violated the rules and regulations of the Federal Communications Commission. The court denied jurisdiction and did not address the issue. The instant complaint is absolutely not *res judicata*.

Page 14, ¶ 2: "The only argument petitioners make with regard to res judicata **is that the Georgia courts did not** re-try **the issue of whether the FCC properly approved the sale of the licenses owned by WFDR."** (Emphasis added.)

This barbaric statement goes directly to why the writ of certiorari should issue. First, the said bankruptcy

has never ruled on the FCC action. An FCC license is not a saleable commodity. The right to use air for radio which is dependent on government permit, limited both as to extent and time is permissive not vested. *See American Bond and Mortgage Co. v. U.S.*, C.C.A. Ill. 1931, 52 F.2d 318. Certiorari denied 52 S. Ct. 311, 285 U.S. 538, 76 L.Ed. 931.

Page 14, ¶ 2: "In its letter refusing to deny or defer transfer of control of the licenses from WFDR to Provident, the FCC specifically stated that the issue of ownership of the licenses and stock had already been determined by the bankruptcy court and that any remaining issues were legal issues rather than administrative issues. Therefore the issues of whether the FCC properly allowed the transfer of the licenses and other assets of WFDR was resolved in the bankruptcy court and in the Georgia related proceedings."

Respondents' characterization of the FCC letter to petitioners (Petition Appendix 9) is repulsive. In judicial review of a Commission decision, the court may consider only what the agency did, not counsel's post hoc rationalization. *See Sudbrink Broadcasting, Inc. of Florida v. Federal Communications Commission*, 1974, 509 F.2d 419, 166 U.S. App. D.C. 85.

An attorney is not to make a false statement of fact. A court troubled by attorney quoting a statute but leaving out a key word cited authority to the effect that the duty of an attorney to deal honestly and candidly with the court even to the extent of disclosing adverse authority is greater than the duty to the client; *United States v. Ott*, 489 F.2d 872 (7th Cir. 1973).

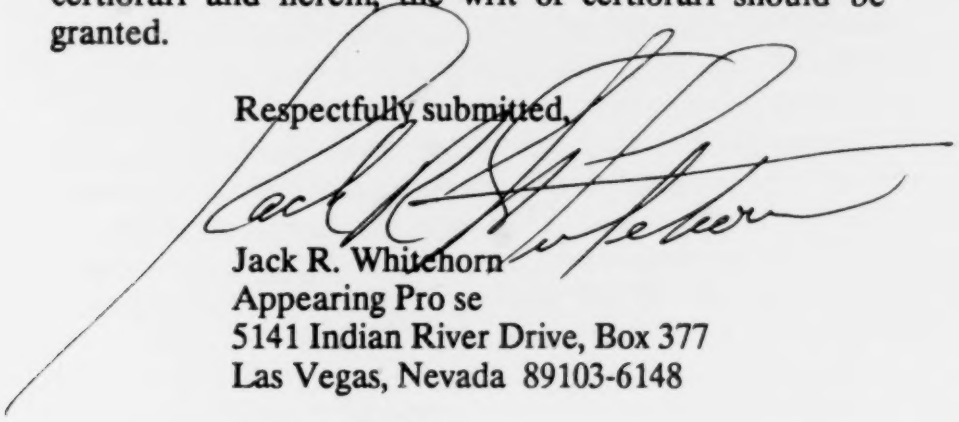
With reference to improper service, the Third Circuit has said: "An action is related to bankruptcy if the outcome could alter the debtor's rights either positively or

negatively and which in any way impacts upon the handling and administration of the bankruptcy estate; *Pacor, Inc. v. Haggins*, 743 F.2d 984, 994 (3 Cir. 1984); *In re Bobroff*, 766 F. 2d 797 (3 Cir. 1985).

CONCLUSION

For reasons as set out in the petition for writ of certiorari and herein, the writ of certiorari should be granted.

Respectfully submitted,



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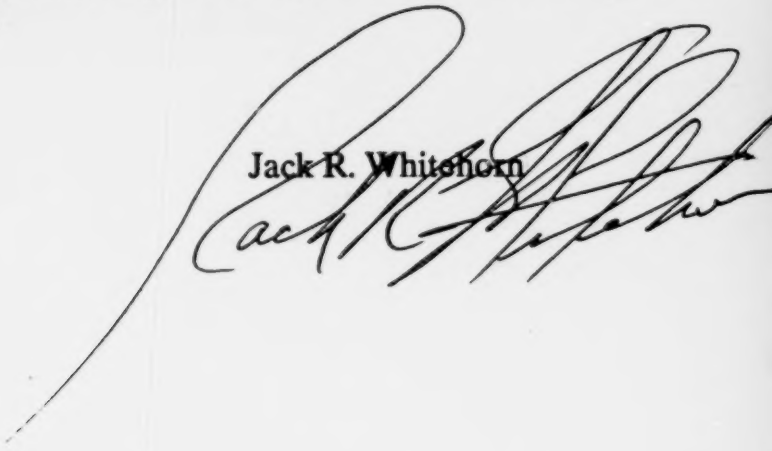
CERTIFICATE OF SERVICE

The undersigned hereby certified that I have served the requisite number of copies of the foregoing Reply Brief on:

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by placing same in the United States mail, first class postage prepaid, this 22nd day of December 1990. I further certify that all parties required to be served have been served.



Jack R. Whitehorn